

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

and proof of service

77-1456

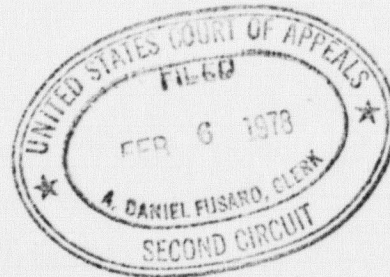
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
:
UNITED STATES OF AMERICA,
:
Appellee,
:
-against-
:
JOSE MIGUEL ATILES,
:
Appellant.
:
-----x

77 - 1456

B
p/s

APPELLANT ATILES' APPENDIX



JESSE BERMAN

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INDICTMENT

77 Cr. 330

PAGINATION AS IN ORIGINAL COPY

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

MANUEL PEREZ and
JOSE MIGUEL ATILES,

Defendants.

INDICTMENT

77 Cr. 330

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1977 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, MANUEL PEREZ and JOSE MIGUEL ATILES, the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about January 28, 1977, MANUEL PEREZ, the defendant and a co-conspirator had a conversation concerning six ounces of heroin which MANUEL PEREZ, the defendant, was going to keep in his apartment for his customers.
2. On or about January 28, 1977, MANUEL PEREZ, the defendant, sold approximately one ounce of heroin hydrochloride to an undercover agent of the Drug Enforcement Administration for \$1400.00.
3. On or about February 11, 1977, MANUEL PEREZ, the defendant, offered to sell an undercover agent of the Drug Enforcement Administration one-eighth kilogram of heroin hydrochloride.
4. On or about February 11, 1977, in a bar on Avenue D in Manhattan, MANUEL PEREZ, the defendant, in the presence of five other Hispanic males, searched an undercover agent of the Drug Enforcement Administration, stating that sixteen of his people had been arrested in Chicago.
5. On or about February 14, 1977, MANUEL PEREZ, the defendant, sold approximately one ounce of heroin hydrochloride to an undercover agent of the Drug Enforcement Administration.
6. On or about February 23, 1977, MANUEL PEREZ, the defendant, sold approximately four ounces of heroin hydrochloride to an under cover agent of the Drug Enforcement Administration for \$6,000.00.
7. On or about April 12, 1977, MANUEL PEREZ and JOSE MIGUEL ATILES, the defendants, had a conversation concerning the sale of approximately 5 ounces of heroin.

8. On or about April 12, 1977, MANUEL PEREZ and JOSE MIGUEL ATILES, the defendants, possessed approximately 5 ounces of heroin which ATILES stated was of excellent quality. (Title 26, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 23th day of January, 1977, in the Southern District of New York, MANUEL PEREZ, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one ounce of heroin hydrochloride

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 14th day of February, 1977, in the Southern District of New York, MANUEL PEREZ, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one ounce of heroin hydrochloride

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 23rd day of February, 1977 in the Southern District of New York, MANUEL PEREZ, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately four ounces of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

On or about the 12th day of April, 1977, in the Southern District of New York, MANUEL PEREZ and JOSE MIGUEL ATILES, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately five ounces of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

DOCKET SHEET

21:812, § 41(a)(1)
& § 41(b)(1)(A)

Consp. to violate Federal Narcotics Laws
Distr. & possess. of Heroin, I.

13

MAIL • RELEASE

20.

4/13/77

II. KEY DATES & INTERVALS

ARREST or		INDICTMENT		ARRAIGNMENT		TRIAL	
U.S. Custody Began	High Risk Date	Information ☐		1st Plea	Trial Set For	First Began	
4/12/77		5-2-77		5-12-77	9-12-77	7-27-77	
Summons Served	Indict Waived ☐	Superseding ☐		Final Plea	Guilty ☒ Not Guilty ☐ Not Plead ☐	Final Ended	
First Appearance	In Charging District	Indict/Info ☐			Guilty ☐ Not Guilty ☐ Not Plead ☐	10-6-77	

☐ Disposition of Charges
 10-6-77
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On Government's Motion

SENTENCE
 11-09-77
☒ On All Charges
☒ Lesser
☒ Offense(s)
☐ WOP: ☐ WP

[illegible]

Constance Cushman
791-9099 2/5

Jesse Berman 1471
351 Broadway, N.Y.C. 10013
431-4600

PEREZ -01

4/13/77 Complaint filed, Jesse Berman, 351 Broadway, N.Y. assigned.
Defendant released on bail, address: 170 Ave. C., N.Y.

5-2-77 INDICTMENT FILED, 77 CR 330.....Knapp, J.

5-12-77 Deft. (atty. Robert Bloom for Jesse Berman) pleads not guilty.
Bail \$20,000 PRB with pre-trial services supervision,
continued. Case assigned to Conner, J. for all purposes.
.....Knapp, J.

5-12-77 Filed notice of appearance of Jesse Berman as attorney for deft.

5-12-77 Filed the following papers received from Mag Jacobs (Mag.No. 77-455)
criminal complaint filed on:4-13-77, disposition sheet, financial
affidavit, Appearance bond in the sum of \$20,000 Dated:4-13-77

5-31-77 CONFERENCE HELD (Attys for Defts present)
TRIAL DATE set for SEPT. 12, 1977. CONNER, J

3-5-21-77 E-1

— OVER —

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77Cr.330 JOSE MIGUEL ATILES

WCC

8-77 Filed motion for bill of particulars, discovery and inspection, severance and to suppress evidence...

8-77 Filed affdvt. of C. Cushman, AUSA in opposition to pre-trial motions..

12-77 DEFT (Atty Jesse Berman present) Interpreter for deft Atilos Margarita Cartagena-sworn-Trial Date Set for SEPT.26-1977 BAIL CONT'D. CONNER, J

29-77 Deft. & atty Jesse Berman present..Interpreter Norma Seltzer present....Jury trial begun...

9-3-77 Trial cont'd.

9-4-77 Trial cont'd.

9-5-77 Trial cont'd.

9-6-77 Trial cont'd. & concluded...Jury verdict..Deft.Guilty cts. 1 and 5 P.S.I. ordered...Sent. adjd to 11-9-77 at 9:30 a.m. Deft remanded in lieu of bail fixed at \$25,000 cash or surety. Conner, J.....

7-77 Filed Govts request to charge..

7-77 Filed Govts proposed examination of jurors..

1-09-77 Filed Judgment (Atty. Jesse Berman, present) The defendant is committed for imprisonment for a period of EIGHTEEN (18) MONTHS on each of Counts 1 and 5 to run concurrently with each other, pursuant to Title 18, U.S. Code, Section 3651, on condition that the defendant be confined to a jail-type institution for a period of SIX (6) MONTHS. The remainder of the sentence of imprisonment is suspended and the defendant is placed on probation for a period of TWELVE (12) MONTHS, subject to the standing probation order of this Court. Pursuant to Title 21, U.S. Code, Section 841, the defendant is placed on Special Parole for a period of THREE (3) YEARS, to run concurrently with the terms of probation supervision. Defendant shall be given credit for time already served. Defendant remanded in lieu of bail, pending appeal. CONNER, J

Entered on: 11-10-77

Issued Commitment and Copies.

11-10-77 Filed notice of appeal in forma pauperis from judgment dated 11-9-77..Copy given to Asst.U.S.Att. and Jesse Berman Esq. 351 Broadway NYC for deft...

10-7-77 FLD DEFT ATILES' REQUEST TO CHARGE

3-6-6-77 E-1

3-6-28-77 E-1

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

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COURT'S CHARGE TO THE JURY

(Trial Transcript, pp. 423-477)

(In open court, jury present)

THE CLERK: The court is about to charge the jury.

Any spectator desiring to leave will do so now or remain seated until the completion of the Court's charge.

Marshall, will you lock the courtroom door.

THE COURT: Ladies and gentlemen of the jury, we have finally come to that part of the case where the attorneys have completed their jobs, the evidence is all in, they have made their summations, and you and I have to perform our specific functions.

As members of the jury you are the sole and exclusive judges of the facts in the case. YOU and you alone will determine the weight to be given the various items of evidence in the case, the credibility of the witnesses, the reasonable inferences to be drawn from the evidence or the lack of evidence.

My function at this point is to instruct you as to the applicable law, that is, the legal tests and standards that you will apply to the facts as you find them.

Your verdict will be the result of applying to the facts which you find in your deliberations the legal tests and standards that I explain to you now in this charge.

With respect to the issues of fact in the case, it is your recollection of the evidence and yours alone that

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1 should govern. Anything that counsel, either for the
2 government or for the defense, may have said with respect
3 to the evidence in the case is not conclusive. It is your
4 recollection of the evidence that should control. Any
5 anything that counsel may have said or anything that I
6 might have said should not be substituted by you for your
7 own recollection of the evidence.

8 Likewise any objections that were made by
9 attorneys and anything said in the course of those objections,
10 any rulings that the court made on those objections or
11 anything that the Court may have said in the course of
12 those rulings is not evidence in the case and should not be
13 considered by you. Those are merely legal matters which
14 should have no bearing on your determination of the facts.

15 This proceeding was begun by means of an indictment,
16 which is simply a paper setting forth in formal words the
17 charge which is made against the defendants in this case.
18 It is the thing which gets this proceeding started, the
19 trigger for the criminal trial.

20 The mere fact that an indictment has been brought
21 in this case is not evidence of the guilt of the defendant.
22 It is merely a statement of the government's charge. It is
23 up to you, the jury, to determine whether that charge has been
24 proven.

25 The government has the burden of proving the charge

1 beyond a reasonable doubt. That BURDEN NEVER shifts. It
2 remained on the government throughout the trial and it will
3 remain on the government throughout your deliberations in
4 the jury room until you find that the government has sat-
5 isfied its burden of establishing the guilt of the
6 defendant beyond a reasonable doubt.

7 The defendant is presumed to be innocent until
8 proven guilty beyond a reasonable doubt. He is not required
9 to take the stand and testify, nor is he required to
10 introduce any evidence of any kind. He is entitled under the
11 Constitution to remain absolutely silent and to leave the
12 government to its proof and to have you determine on the
13 basis of the government's proof whether his guilt has been
14 proven beyond a reasonable doubt.

15 As I told you earlier, that presumption of innocence
16 and that privilege of remaining silent would be worthless if
17 from the mere fact that a defendant chose to remain silent
18 you infer that he must be guilty or that he must have something
19 to hide.

20 Now, what does the expression "reasonable doubt"
21 mean? The words almost define themselves. A reasonable
22 doubt is a doubt founded on reason and arising out of the
23 evidence in the case or the lack of evidence. It is a doubt
24 which a reasonable person would have after carefully weighing
25 all the evidence. It means a doubt that is reasonable, that

1 is substantial, and not merely negligibile.

2 Stated another way, a reasonable doubt is a doubt
3 for which you have a reason, but you need not be able to
4 fully formulate or articulate it, that is, to express in words
5 so that you can communicate to someone else the basis of your
6 doubt.

7 If you, as a juror, after carefully considering
8 all of the evidence can reasonably draw two conclusions,
9 one of innocence and one of guilt, then you do have a
10 reasonable doubt. Provided you can reasonably draw either
11 one of those conclusions. And in that case you must return
12 a verdict of not guilty.

13 Stated still another way, a reasonable doubt is
14 one which appeals to your reason, your judgment, your
15 common sense and your experience. It is not a whim or a
16 speculation. It is not an excuse to avoid the performance
17 of an unpleasant duty. It is not to be confused with
18 sympathy for the defendant.

19 If after a fair and impartial consideration of
20 all of the evidence you can candidly and honestly say that
21 you are convinced of the guilt of the defendant to such
22 extent that you do not have misgivings about your verdict,
23 such a conviction as you would be willing to act upon in
24 important matters in your own personal affairs, then you do
25 not have a reasonable doubt and in that circumstance it is

1 your duty to return a verdict of guilty.

2 If, on the other hand, after such a fair and
3 impartial consideration you can candidly and honestly
4 say that you are not satisfied of the guilt of the defendant,
5 that you do not have an abiding conviction of his guilt,
6 then you do have a reasonable doubt and it is your duty to
7 return a verdict of not guilty.

8 In other words, a reasonable doubt is the kind of
9 a doubt which would cause you as a reasonable person to hes-
10 itate to act in important matters in your own personal
11 affairs.

12 Beyond a reasonable doubt does not mean to a pos-
13 itive certainty or beyond all possible doubt. If that were
14 the rule few men, however guilty, could be convicted. It
15 is practically impossible for anyone to be absolutely
16 and completely convinced of any fact susceptible of dispute,
17 which by its very nature is not capable of being determined
18 to a mathematical certainty.

19 As a result, the law in a criminal case is that
20 it is not necessary for the government to establish the
21 guilt of a defendant beyond all possible doubt or to an
22 absolute certainty. It is only necessary that the government
23 prove the defendant guilty beyond a reasonable doubt.

24 The indictment in this case contains two counts
25 or two separate charges. You will have in your deliberations

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1 to return two separate verdicts: a verdict of guilty or
2 not guilty on each of those two counts. You must consider
3 them entirely separately. Consider each one as though it
4 were the only count or charge in the case. Each count of
5 the indictment names two defendants. Only one of those
6 defendants, Jose Attiles, is on trial before you. It is
7 his guilt or innocence which you must determine on each of the
8 two counts.

9 Guilt is a personal matter. It is entirely possible
10 for one defendant to be guilty and entirely possible for
11 the other defendant to be innocent on both counts. So the
12 guilt or innocence of Mr. Attiles must be determined solely
13 on the basis of the evidence before you which relates to him
14 either directly or indirectly.

15 The charge against him in each of these two counts
16 stands or falls on the basis of the evidence which is
17 chargeable against him.

18 Now, the first count of the indictment charges
19 a conspiracy. It charges that Manuel Perez and Jose Attiles
20 and others known and unknown to the Grand Jury conspired
21 to violate the narcotics laws. We will be referring in our
22 charge to count one as the conspiracy count.

23 Count two charges what is sometimes referred to
24 as a substantive violation of the narcotics laws.

25 The conspiracy charge is essentially a charge of

1 conspiring or agreeing to violate the laws, whereas the
2 substantive violation that is, the actual violation of the
3 laws is what is charged in the other count or the
4 substantive count.

5 Now, I am going to go into the two counts separately
6 A conspiracy to commit a crime is an entirely separate and
7 different offense from the substantive crime which is the
8 objective of the conspiracy. The essence of the crime of
9 conspiracy is an agreement or understanding to violate
10 other laws. If a conspiracy exists, even though the
11 conspiracy may fail, it is still punishable as a crime
12 whether or not the conspiracy succeeded in its purpose.

13 In other words, in order to make out a conspiracy
14 charge it is not necessary for the government to prove an
15 actual violation of the narcotics laws, only an agreement
16 to violate the narcotics laws coupled with certain other
17 things that I will describe to you more in detail in a
18 minute.

19 A conspiracy is sometimes referred to as a
20 partnership in crime. Because such a partnership or
21 collective or organized action may present a greater potential
22 threat to the public interest than the illicit activity
23 of a lone wrongdoer, Congress has made a conspiracy a
24 separate offense, apart from the violation of the narcotics
25 laws which is the subject of Count two of the indictment.

1 Now, let me read count one of the indictment.
2 I will read the first part of it first and the latter part
3 of it a little later on in my charge.

4 "The Grand Jury charges from on or about the
5 first day of January 1977, and continuously thereafter, up
6 to and including the date of the filing of this indictment,
7 which is May 2, 1977, in the Southern District of New York,,
8 which includes Manhattan, Manuel Perez and Jose Miguel Attiles,
9 the defendants, and others to the grand Jury known and
10 unknown, unlawfully, intentionally and knowingly combined,
11 conspired, confederated and agreed together and with each
12 other to violate Sections 812, 841(a)1, and 841(b)1a of
13 Title 2], United States Code."

14 Those are simply sections of the United States
15 Code which forbid the distribution fo Narcotics, certain
16 narcotics and the possession of such narcotics with the intent
17 to distribute.

18 Paragraph two reads, "It was part of said conspiracy
19 that the said defendants unlawfully, intentionally and knowingly
20 would distribute and possess with intent to distribute
21 Schedule One Narcotic Drug Controlled Substances, the exact
22 amount thereof being to the Grand Jury unknow, in violation
23 of Sections" so and so, being the same sections I referred to
24 a moment ago when I was reading from Paragraph One.

25 Before you can convict the defendant, Jose Miguel

1 Attiles, on the charge made in Count One, you must find
2 each of the following three essential elements beyond
3 a reasonable doubt:

4 First, you must find that a conspiracy existed as charged.
5 The conspiracy charge, as I told you a moment ago, is
6 entirely separate and distinct from the substantive violation
7 of law which is charged in Count two. The substantive
8 violation in this case is the actual possession of a
9 controlled substance with the intent to distribute it. But
10 Court one charges a conspiracy to possess a narcotic drug
11 with intent to distribute it or the conspiracy to actually
12 distribute it.

13 Now, in this case the government has introduced
14 proof which it finds sufficient with respect to both the
15 substantive violation and the conspiracy. From the actual
16 distribution or possession with intent to distribute
17 narcotic drugs, specifically heroin, it is possible for you
18 to conclude that a conspiracy existed, that is, the per-
19 formance of an act, as I will tell you further, may be taken
20 by you as evidence of a conspiracy to perform the act.

21 The second element which you must find, also
22 beyond a reasonable doubt, is that the defendant knowingly
23 and wilfully associated himself with the conspiracy.

24
25 And third, you must also find beyond a reasonable

1 doubt that at least one of the members of the conspiracy
2 committed at least one of the overt acts set forth in the
3 indictment at or about the time and place alleged.

4 Now, I have not read the part of Count one that
5 lists the overt acts. I will do that in amoment.

6 Those three things, then, the government must
7 establish, and it must establish each of them beyond a reason-
8 able doubt before you can convict the defendant on Count one.
9 First the existence of a conspiracy as charged in Count one;
10 second, that the defendant knowingly and wilfully
11 associated himself with the conspiracy; and thirdly, that
12 at least one of the members of the conspiracy performed
13 at least one of the overt acts alleged in Count one at or about
14 the time and place alleged and in furtherance of the objectives
15 of the conspiracy. And you must find each of those
16 three elements beyond a reasonable doubt.

17
18 (Continued on next page)

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A-19

1 rdsml

2 USA v. ATILES (77 CR 330) W.C.C.-

3 Hon. William C. Conner, U.S.D.J.

4 October 4, 1977 - 1:45 p.m.

5 CHARGE OF THE COURT (Excerpt)

6 Now, let us consider the three elements separately.
7 As I mentioned to you earlier, the essence of the crime of
8 conspiracy is an unlawful combination or agreement to violate
9 the law. As I also mentioned, whether or not the defendants
10 actually accomplished what it is alleged they conspired to
11 accomplish is immaterial to the question of their guilt or
12 innocence on the charge of conspiracy.

13 To establish a conspiracy the Government is not
14 required to show that two or more persons sat around a table
15 and negotiated and entered into a formal agreement either
16 orally or in writing, stating that they have formed a con-
17 spiracy to violate the law, setting forth the details of
18 the plans, the part to be performed by each of the members
19 of the conspiracy, and so on. It would be extraordinary
20 indeed if a criminal conspiracy was accompanied by any such
21 formal agreement. Your common sense will tell you that
22 when persons undertake to enter into a criminal conspiracy,
23 they leave much to unexpressed understanding. They don't
24 usually reduce their agreements to writing or have them
25 notarized, nor do they publicly broadcast their plans.

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1 rds2

2 From its very nature a conspiracy to commit a crime is
3 almost invariably secret in its origin and in its execution.

4 It is sufficient if two or more persons in any
5 manner through any contrivance, impliedly or expressly,
6 come to a common understanding to violate the law. Express
7 language or specific words are not required to indicate an
8 attachment to the conspiracy or association with it. Nor
9 is it required that you find that all of the coconspirators
10 alleged in the indictment joined in the conspiracy in order
11 to find that a conspiracy existed.

12 You need only find that the defendant, Jose Miguel
13 Atilas, conspired with at least one other person to violate
14 the federal narcotics laws as charged in order to find that
15 a conspiracy existed.

16 In determining whether there has been an unlawful
17 agreement, you may judge the acts and statements of the
18 alleged coconspirators which were done or said to carry out
19 an apparent criminal purpose. The old adage "Actions speak
20 louder than words" is applicable here. Often the only evi-
21 dence of a conspiracy which is available is that of a series
22 of acts or statements which, when taken together, create in
23 the mind of the person receiving those facts the conclusion
24 that a conspiracy existed.

25 The offense is complete when the unlawful agreement

1 rds3

2 is made and any single overt act to accomplish any of the
3 objectives of the conspiracy is thereafter committed by at
4 least one of the conspirators.

5 As I told you, it is unnecessary for the Govern-
6 ment to establish that the conspiracy succeeded in its
7 intended purpose. However, proof that the conspiracy did
8 succeed may be taken by you as very persuasive evidence of
9 the existence of the conspiracy. So you should consider,
10 in determining whether a conspiracy existed, all of the
11 evidence in the case, including all of the acts and conduct
12 and all of the statements made by the conspirators.

13 You are permitted to draw reasonable inferences
14 from that type of circumstantial evidence. And in a moment
15 I will define for you more particularly what I mean when I
16 refer to circumstantial evidence.

17 If you find, after consideration of all that
18 evidence, beyond a reasonable doubt that the defendant,
19 Jose Miguel Atilas, and at least one other person met in
20 a common understanding and agreement to work together in
21 furtherance of the unlawful scheme alleged in the indictment,
22 then proof of the existence of the conspiracy is complete.
23 That was the first element of the Government's case on the
24 conspiracy count.

25 The second element, you may remember, was that

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1
2 you must find beyond a reasonable doubt that the defendant
3 Jose Atilas knowingly joined the conspiracy with the inten-
4 tion of furthering its illegal purpose.

5 To find that Jose Atilas was a member of the
6 conspiracy you must find that he knowingly and intentionally
7 participated in it. Mere knowledge by the defendant of
8 the existence of the conspiracy or knowledge of an illegal
9 act on the part of one of the conspirators is not enough.

10 Mere familiarity with the members of the con-
11 spiracy, even friendship and association is not enough.
12 The Government must satisfy you beyond a reasonable doubt
13 that Jose Atilas not only knew of the conspiracy and of
14 its illegal purpose, but also that he associated himself
15 with it, with the intention of furthering the accomplishment
16 of those purposes.

17 So if a defendant with understanding of the
18 unlawful character of the conspiracy intentionally engages
19 in, advises or assists the undertaking for the purpose of
20 advancing its success, he thereby becomes a knowing and
21 willful participant or conconspirator.

22 A single act of a defendant may be sufficient to
23 draw that defendant into the scope of the conspiracy, if
24 you find that that act was performed with knowledge of the
25 conspiracy and its illegal purposes and with the intent of

1 rds 5

2 advancing those purposes.

3 Now, in determining the defendant's knowledge and
4 intent, that is, what he knew and what his purpose was,
5 you may have to rely to some or perhaps even to a total
6 degree on circumstantial evidence or on inferences. Medical
7 science has never invented a machine which will allow us to
8 look into a man's brain to see what he is really thinking
9 or what he really knows or what he really intends. He may
10 tell us what he intends, but that is not direct evidence of
11 what he actually intends. Sometimes the best proof, and
12 sometimes the only proof, of what a man knows and what he
13 intends is what he does. Again, the adage "Actions speak
14 louder than words" is applicable here.

15 In determining what the defendant knew and what
16 he intended, you should consider all of the surrounding
17 circumstances as established by the evidence. What do you
18 conclude he knew and intended from all of those circumstances?
19 You may consider the things that he saw, the quantity of
20 narcotics, the cost of the narcotics, the things that were
21 said in the course of the transaction about which there was
22 testimony, what the defendant did or said, and all of the
23 surrounding circumstances in determining his knowledge and
24 intent.

25 In order to establish the defendant's membership

1 rds 6

2 in the conspiracy, it is not necessary for the Government
3 to show that he knew all of the other members of the
4 conspiracy, nor is it necessary for the Government to
5 establish that they were all members at the same time.
6 Different members of the conspiracy may have differing
7 levels of participation, differing degrees of importance
8 in the overall plan of the conspiracy. However, as I
9 told you before, mere association with the members of the
10 conspiracy does not make one a member. Nor is mere know-
11 ledge of the existence of the conspiracy without actual
12 participation sufficient to make one a conspirator.

13 Likewise the extent or duration of participation
14 in the conspiracy does not determine his membership. As
15 long as he was a member at any time, having joined the
16 conspiracy with knowledge of its illegal purposes and
17 with an intent to further those purposes, the extent or
18 duration of his membership is unimportant.

19 If one joins a conspiracy after it is formed
20 and engages in it to a degree more limited than the
21 engagement of the other conspirators, he is equally
22 culpable or equally responsible for violation of the law
23 so long as a conspiracy existed and he joined it with
24 knowledge of its illegal purposes and with the intent to
25 assist in those purposes.

A defendant may join a conspiracy at any point

1 rdsd 7

2 in its progress and be held responsible for all that the
3 conspiracy has done before and everything more that it
4 does while he remains a member.

5 Having joined the conspiracy he assumes all of
6 the liabilities and responsibilities of it, including the
7 responsibility for acts performed before his membership.

8 When people enter into a conspiracy they become
9 agents for one another in carrying out the conspiracy.
10 For that reason the acts and declarations of each member of
11 the conspiracy done in the course of the conspiracy and
12 in furtherance of the common purpose are deemed to be the
13 acts of all members, and all members are equally respon-
14 sible for such acts.

15 Accordingly, if you find that the conspiracy
16 existed and that Jose Atilas joined it, as I have indicated,
17 then all of the acts and all of the statements by other
18 members of the conspiracy are chargeable to the same extent
19 as if he had performed those acts or made those state-
20 ments himself.

21 Now, this principle applies only to acts and
22 statements made during the continuance of the conspiracy
23 and in furtherance of the purposes of the conspiracy. It
24 does not apply to acts or statements which do not have
25 those characteristics.

1 rds 8

2 Now, let us turn to the third element, which is
3 the overt acts. Assuming that you have found that a conspi-
4 racy existed and assuming you have found further that Jose
5 Atilas joined that conspiracy, as I have defined that, then
6 you must determine whether the Government has also estab-
7 lished beyond a reasonable doubt the commission of at least
8 one of the overt acts charged in Count One in furtherance
9 of the objectives of the conspiracy.

10 An overt act is any step or action which is taken
11 to achieve, accomplish or further the objective of the
12 conspiracy. The purpose of requiring proof of an overt
13 act is that two persons may agree to violate the law and
14 change their minds and do nothing to carry out that agree-
15 ment, in which case the law would not have been violated.
16 The law requires something more than the agreement to
17 violate the law. It requires at least one act to be per-
18 formed in furtherance of the scheme of violation. The overt
19 act need not be a criminal act in and of itself, as long
20 as it is performed for the purpose of advancing the ultimate
21 criminal objective.

22 Now, I will read you the part of Count One which
23 is entitled Overt Acts. It reads, "In pursuance of the
24 said conspiracy and to effect the objectives thereof, the
25 following overt acts were committed in the Southern District

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1 rdm 9
2 of New York.

3 "One, on or about January 28, 1977, Manuel Perez,
4 the defendant, and a coconspirator, had a conversation
5 concerning six ounces of heroin which Manuel Perez, the
6 defendant, was going to keep in his apartment for his
7 customers.

8 "Two, on or about January 28, 1977, Manuel Perez,
9 the defendant, sold approximately one ounce of heroin hydro-
10 chloride to an undercover agent of the Drug Enforcement
11 Administration for \$1400.

12 "Three, on or about February 11, 1977, Manuel Perez,
13 the defendant offered to sell an undercover agent of the
14 Drug Enforcement Administration one-eighth kilogram of
15 heroin hydrochloride.

16 "Four, on or about February 11, 1977, in a bar
17 on Avenue D in Manhattan, Manuel Perez, the defendant, in
18 the presence of five other Hispanic males, searched an
19 undercover agent of the Drug Enforcement Administration,
20 stating that 16 of his people had been arrested in Chicago.

21 "Five, on or about February 14, 1977, Manuel Perez,
22 the defendant, sold approximately one ounce of heroin
23 hydrochloride to an undercover agent of the Drug Enforcement
24 Administration.

25 "Six, on or about February 23, 1977, Manuel Perez,

1 rsdm 10

2 the defendant, sold approximately four ounces of hercin
3 hydrochloride to an undercover agent of the Drug Enforcement
4 Administration for \$6,000."

5 Now, you will note that each of those first six
6 overt acts which are alleged in Count One are acts of
7 Manuel Perez, who is alleged by the Government to be a co-
8 conspirator with the defendant Jose Atilas.

9 Paragraph 7 alleges an overt act in which both
10 Manuel Perez and Jose Atilas personally participated. It
11 reads, "On or about April 12, 1977, Manuel Perez and Jose
12 Miguel Atilas, the defendants, had a conversation concerning
13 the sale of approximately five ounces of heroin."

14 Paragraph 8 likewise alleges participation
15 personally by both defendants, and it reads, "On or about
16 April 12, 1977," the same date referred to in paragraph 7,
17 "Manuel Perez and Jose Miguel Atilas, the defendants,
18 possessed approximately five ounces of heroin which Atilas
19 stated was of excellent quality." Then there is a reference
20 to one of the statutory sections that I referred to a moment
21 ago and which concerns the distribution or possession with
22 intent to distribute narcotic drugs, including heroin and
23 heroin hydrochloride.

24 It is not necessary for the Government to prove
25 that each member of the conspiracy or Jose Atilas in particular

1 rsdm 11

2 committed or participated in any particular one of the overt
3 acts. Since, as I explained to you earlier, once you have
4 found that a conspiracy exists the act of any member of
5 the conspiracy in furtherance of the objectives of the
6 conspiracy becomes the act of all the other members. More-
7 over, the Government is not required to prove all eight of
8 the overt acts alleged in Count One. It is sufficient if
9 the Government establishes beyond a reasonable doubt that
10 at least one of those eight alleged overt acts was per-
11 formed in the Southern District of New York, which includes
12 Manhattan, at or about the time alleged.

13 Now, the overt act need not have taken place at
14 the precise time and place alleged, as long as the allega-
15 tion is substantially correct or substantially borne out
16 by the evidence beyond a reasonable doubt.

17 A conspiracy, once formed, is presumed to have
18 continued until its objectives are accomplished or until
19 there is an affirmative act of termination by its members.
20 Likewise, once a person has been found to be a member of a
21 conspiracy, he is presumed to continue that membership until
22 the conspiracy is terminated or until there is affirmative
23 proof of his withdrawal or dissociation from the conspiracy.

24 The indictment charges that the conspiracy
25 existed from on or about the first day of January, 1977,

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1 rsdm 12

2 up to and including the date of filing of the indictment,
3 which is May 2, 1977. However, it is not essential that
4 the Government prove that the conspiracy started and ended
5 on those specific dates or even about on those specific
6 dates. It is sufficient if you find that a conspiracy was
7 formed and existed for some time within the period set forth
8 in the indictment and that at least one of the overt acts
9 was committed in furtherance of the objectives of the con-
10 spiracy within that period.

11 So much for count one of the indictment, the
12 Conspiracy Count. Let's turn to Count five, which is
13 quite brief, and I will read it. There are a total of
14 five counts in the indictment and this defendant is only
15 charged in Count one and Count five. YOU need not be
16 concerned with ~~why~~ there are additional counts. As I will
17 explain to you further, you need not be concerned with why
18 the other defendant who is named in the indictment is
19 not on trial here. YOU need only concern yourself with
20 whether the government has established beyond a reasonable
21 doubt that the defendant, Jose Miguel Attiles, is guilty of
22 the offenses charged in Count one and in Count five.

23 Count five reads, "The Grand Jury further charges
24 on or about the 12th day of April, 1977, in the Southern
25 District of New York, Manuel Perez and Jose Miguel Attiles,

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1 the defendants, unlawfully, intentionally and knowingly
2 did possess with intent to distribute a Schedule One
3 Narcotic Drug Controlled Substance, to wit, Approximately
4 five ounces of heroin hydrochloride." That is followed by
5 a citation of the same statutory sections that referred to
6 earlier which make it unlawful to distribute or possess
7 with intent to distribute certain narcotic drug substances,
8 including heroin and heroin hydrochloride.

9 Before you can find the defendant guilty of
10 the offense charged in Count five of the indictment, you must
11 be convinced beyond a reasonable doubt that the government
12 has proved each of the following three elements:

13 First, that on or about the dates set forth in
14 Count two, that is, April 12, 1977--

15 MS. CUSHMAN: Perhaps it would clarify to explain
16 there is a redacted indictment that has been prepared and
17 typied.

18 THE COURT: I don't have it here.

19 MS. CUSHMAN: If your Honor would like a copy
20 I can give it to you.

21 THE COURT: As long as it is available to the
22 Jury.

23 MS. CUSHMAN: The requests to charge are on the
24 basis of the redacted document.

25 THE COURT: You should consider the case as though

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1 there were only two counts in the indictment, and Count five
2 has been renumbered as Count two because Counts two, three
3 and four were dropped. They concern only the other named
4 defendant, Manuel Perez.

5 Here are the following three elements that you
6 must find beyond a reasonable doubt before you can return
7 a verdict of guilty on Count two of the modified indictment:

8 First, that on or about the date set forth in
9 Count two, JOse Miguel Attiles possessed with intent to
10 distribute a narcotic drug controlled substance, namely, heroin.

11 Second, that he did so unlawfully, wilfully and
12 knowingly.

13 And third, that the substance which he possessed was
14 in fact heroin.

15 The government contends that the defendant, Jose
16 Miguel Attiles, aided and abetted Manuel Perez in the commission
17 of the crime charged in Count two, and I will explain to you
18 in a moment what those words, "aid and abet," mean.

19 Let us consider the three elements now separately.
20 YOU will recall the first element which you must find
21 beyond a reasonable doubt is that the defendant Jose
22 Miguel Attiles possessed with intent to distribute a narcotic
23 drug controlled substance. What does that phrase mean?
24 The word distribute simply means the actual constructive
25 or attempted transfer of the drug. The word possess has its
common everyday meaning, that is, to have something either

1 in your physical possession or within your control. To
2 have something in your control does not necessarily mean to
3 have it in your pocket or to have it in your own strongbox.
4 It also includes having control over a person who has actual
5 physical custody.

6 The word intent has the same meaning that I defined
7 earlier. It refers to a person's purpose, his objective,
8 and, of course, involves a consideration of his state of
9 mind.

10 So the phrase "possess with intent to distribute"
11 can be translated into different words, as meaning to control
12 an item with the purpose to transfer that item.

13 The second element which you must also find beyond
14 a reasonable doubt is that the defendant knowingly, unlawfully
15 and wilfully possessed the drug with the intent to
16 distribute it in the sense that I have just defined those
17 terms.

18 Now, I have already defined the term knowingly.
19 It simply means with knowledge, with awareness. Unlawfully
20 simply means against the law.

21 In order to satisfy the government's burden of
22 showing that the defendant unlawfully possessed a drug with
23 intent to distribute it, you do not have to find or it does
24 not have to show that the defendant knew which law he was
25 violating or that he was aware of the specific terms of the law.

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1 It is only necessary that he was aware of the general
2 unlawful nature of his acts.

3 Wilfully simply means intentionally or deliberately
4 as opposed to accidentally or inadvertently or under duress or
5 coercion.

6 Now, as I told you earlier, knowledge and intent
7 exist only in the mind. There is no way of looking into
8 a man's mind to see what he is actually thinking. So you
9 will have to determine what he knows and what he intends by
10 his actions and by his statements and by all of the other
11 surrounding circumstances, including his failure to make
12 statements under conditions which would normally call for
13 the making of a statement by a normal person under similar
14 circumstances. That is only one of the elements of all
15 of the surrounding circumstances which you must consider
16 in determining the knowledge and intent of the defendant.

17 The third element, as you recall which you must
18 also find beyond a reasonable doubt, is that the narcotic
19 drug controlled substance which the defendant possessed with
20 intent to distribute is heroin or heroin hydrochloride.
21 I instruct you as a matter of law that heroin hydrochloride
22 and heroin are narcotic drug controlled substances in
23 Schedule One of the Narcotics laws, as referred to in Count
24 two of the indictment.

25 It has been stipulated that if a chemist were

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1 called to testify he would say that he tested the exhibit
2 in evidence and that the material contained in that exhibit is
3 heroin or heroin hydrochloride. YOU still must find beyond
4 a reasonable doubt that that material was heroin or
5 heroin hydrochloride.

6 In determining that you may consider not only at
7 stipulated testimony which has the same force and effect as
8 if the chemist had come here in person into the courtroom and
9 sat in the witness chair and told you those things, but you
10 may also consider all of the surrounding circumstances,
11 including the secrecy with which the transactions were
12 handled, the appearance of the substance, ~~the~~ price which
13 was agreed to be paid for the substance and the lack of
14 complaint on the part of the purchaser, and the descriptive
15 language which was used in referring to the substance,
16 together with any other circumstances which might tend to
17 indicate what the substance was that was involved in the
18 transaction.

19 I told you in connection with Count one, the
20 conspiracy count, that it was not necessary to show, for the
21 government to show that the conspiracy actually succeeded in
22 its intended purpose. With respect to Count two, the government
23 must show that there was actual possession of the narcotic
24 drug, in this case heroin or heroin hydrochloride, with the
25 intent to distribute it. It is not necessary for the

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1 government to show that an actual distribution took place,
2 but only that the material was possessed with the intent to
3 distribute it.

4 It is not necessary for the government to show that
5 the defendant, Jose Attiles, was the one who possessed the
6 drug. It is only necessary for it to establish that he aided
7 and abetted, as I will define those terms in a moment, the
8 one who did possess the drugs with the intent to distribute
9 them. In other words, it is enough for the government to
10 establish to your satisfaction beyond a reasonable doubt that
11 Jose Attiles associated himself with the illegal venture and
12 participated in it as something he wished to bring about and
13 whose success he wished to further by his actions. Even
14 a small degree of concert or collusion is sufficient.

15 The assistance which the defendant gives need not
16 be so significant that the transaction would have failed
17 except for his assistance. The standard is not that high or
18 that rigid. It is sufficient if the assistance merely
19 encourages a result which might have taken place even without
20 such encouragement.

21 Accordingly, if you find that Manuel Perez
22 possessed heroin with the intent to distribute it on April
23 12, 1977, in Manhattan and that Jose Attiles assisted him in
24 any material way, whether that assistance was necessary to the
25 accomplishment of the transaction, then you will have found

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1 the defendant guilty insofar as this element, that is, the
2 possession with intent to distribute, of Count two is concerned

3 To determine whether Jose Attiles aided or abetted
4 the commission of an offense you must ask yourselves these
5 questions: Did he participate in it as something he wished
6 to bring about? Did he seek by his action to make it succeed?

7 If you believe beyond a reasonable doubt that he
8 did so, then he is an aider and abettor, and that one of
9 the three elements of Count two will have been satisfied.

10 Now, some general remarks. As I have mentioned
11 earlier briefly, Manuel Perez is named as a defendant in
12 this indictment. He is not on trial here. You should not
13 speculate as to why the government has not prosecuted him in
14 this case. You should not wonder whether or not one
15 defendant has been selected as a scapegoat for the improper
16 actions of another. YOU need only consider the guilt or
17 innocence of this defendant on the basis of the evidence
18 before you, and any speculations about the absence in this
19 trial of teh other named defendant or other unnamed
20 coconspirators should not concern you at all.

21 I have referred to the responsibility which you
22 have for determining the credibility or believability of
23 the witnesses. How do you do that? Well, you do it exactly
24 the same way as you would do it in your own everyday personal
25 or business affairs. If a person comes to you in your
business life or private life and tells you something, you

1 have to decide whether or not to credit that person's
2 statement, how much credibility to give it. You size up
3 the person, what kind of person is he? Does he seem worthy
4 of your belief? What were his actions as he told you the
5 story? Did he seem frank and forthright or was he shifty and
6 evasive? Was he in a position to have personal knowledge of
7 the facts that he told you? Did his story seem plausible?
8 Did it make common sense to you? And to what extent was his
9 his story corroborated or reinforced by other information
10 known to you? Or to what extent was it contradicted by
11 the other information available to you? What motivation
12 does that person have to falsify? Does he have anything to
13 gain by, in the vernacular, selling you a bill of goods?

14 These are all the same factors which you should
15 consider in determining the credibility or believability of
16 the testimony of a witness in this case or in any other
17 case? IN other words, you use your common sense.

18 Most or all of the witness in this case were either
19 drug enforcement agents or police officers. The testimony of
20 such a law enforcement officer is entitled to no greater
21 weight or no less weight than the testimony of any other
22 witness. YOU treat his testimony exactly the same way you
23 would treat the testimony of any other witness, and you
24 determine his credibility in exactly the same way.

25 If you find that any witness has wilfully testified

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1 falsly as to any material matter, it is up to you to
2 determine what effect that should have in your determination
3 of the credibility of the remainder of his testimony. You
4 may decide that becasuse he testified falsly in one respect,
5 you tend to disregard everything else he said.

6 On the other hand, you may decide that even though
7 he testified falsly in one respect, you are inclined to believe
8 all or part of the remainder of his testimony. That is
9 entirely up to you to make that determination.

10 There is no presumption against the government
11 from its failure to call additional agents or officers as
12 witnesses when it appears that their testimony would be merely
13 cumulative or repetitious, of no greater value than that of
14 the witnesses who did appear and testify.

15 I used the expression "circumstantial evidence"
16 and I used also the term "inferences." Both direct and
17 circumstantial evidence should be considered by you in
18 determining your verdict. Direct evidence is evidence which,
19 in the vernacular, comes from the horse's mouth. If you look
20 out the window now and see that it is pouring rain, that is
21 direct evidence that it is raining. If a witness came into
22 the courtroom, with the shades drawn so that you could not
23 see outside, and he said, " I've just come in and it is pouring
24 rain," that again would be direct evidence because he is
25 telling you what he has just personally observed. Your belief

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1 of his testimony would depend on his credibility and you
2 would determine his credibility in the way that I indicated.
3 You would use your common sense and weigh all of those factors
4 which bear on credibility.

5 Suppose, however, that a man comes into the court-
6 room wearing a raincoat which is dripping wet and carrying an
7 umbrella which is dripping wet and does not say a word and
8 walks out, that is circumstantial evidence that it is raining
9 outside. There is no direct evidence because he has not
10 said whether it is raining or not and you can not see whether
11 it is, but it is evidence of one fact which has such a logical
12 relationship to a second fact, that you can infer the existence
13 of the second fact. In other words, you can infer from the
14 fact that the man was wearing a dripping raincoat and
15 carrying a dripping umbrella that it is raining outside.

16 Likewise, in determining a man's state of mind,
17 his knowledge or intent, you will rely on circumstantial
18 evidence and you will draw inferences based on that evidence.

19 Each of the two counts must be considered separately
20 and apart from the other count. You must return a verdict
21 of guilty or not guilty on each of the two counts, and in
22 your deliberations you must consider each count entirely apart
23 from the other. Your verdict must be unanimous on each
24 count, if you are able to return a verdict at all.

25 In your deliberations you should not consider

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1 the punishment which the court might impose in the event you
2 return a verdict of guilty on either count or both. The
3 duty of imposing sentence rests exclusively on the court.
4 Your function is to weigh all the facts, apply to the facts
5 as you find them the legal tests or standards that I
6 explained to you, and reach your verdict solely on the
7 basis of those facts as tested by those legal standards. You
8 should not be influenced by any assumption or conjecture as
9 to the Court's sentence or any sympathy for the defendant or
10 any bias for or against the government. The mere fact that the
11 government has brought the charge, as I indicated, is no
12 evidence whatever of the guilt of the defendant.

13 Likewise, the mere fact that the defendant stands
14 virtually alone in opposition to the power and resources of
15 the United States government should not be a source of sympathy
16 for him.

17 If you find beyond a reasonable doubt that the
18 defendant has violated the law, you must return a verdict of
19 guilty. If you find there is a reasonable doubt as to
20 either count, then you must return a verdict of not guilty
21 on that count, without consideration of the consequences.

22 During your deliberations you may find that you
23 have difficulty recalling the testimony or that you have
24 differing recollections. You have a right to have any part
25 of the testimony reread. If you will simply send a note out

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1 to me through the marshall, who will be posted at the door of
2 the jury room to keep your deliberations private, the court
3 reporter can reread any part of the testimony from his notes.

4 Likewise, if you want to have for your
5 examination in the jury room during your deliberations any
6 of the exhibits or the indictment, you have merely to request
7 it and those exhibits will be sent in. The sole exception,
8 of course, would be the exhibit which is the alleged heroin
9 powder. With respect to that, you may inspect it here in
10 open court.

11 Likewise, if I have failed to make anything clear
12 in my charge or if I have omitted anything or if you can not
13 recall what I said in any respect, merely ask me, through
14 the marshall by means of a note, and I will be glad to explain
15 or to repeat any part of the charge.

16 ^{OJEA}
Mr. Ohaya being the first juror chosen will be
17 the foreman and he will preside as chairman over your
18 deliberations. He will draft any notes that come out, and
19 if and when you reach a verdict he will also report that
20 verdict to the court .

21 If you are brought back into court for any reason,
22 for example to hear some more of the testimony or to have an
23 explanation of part of the charge, you should not indicate
24 what the status of the deliberations are, except to indicate
25 whether or not you have reached a verdict. In other words,

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1 your communication should be only by the handwritten note to
2 the Court, unless and until you are ready to report your verdict

3 Your deliberations are secret and your deliberations
4 should take place only with all twelve members of the jury
5 present and participating. If you are not able to reach
6 a verdict tonight, by approximately six o'clock or so, I will
7 let you go home for the evening. You may come back in the
8 morning and resume your deliberations. But if you happen
9 to see one of your fellow jurors on the subway platform or
10 on the sidewalk or in the courthouse corridor, do not discuss
11 the case. The deliberations should take place only with a
12 full jury present.

13 You may find when you commence your deliberations
14 that you start out with many differing points of view. The
15 purpose of your deliberations is to exchange those points of
16 view freely and, ever more importantly, to listen with
17 an open mind to what your fellow jurors are saying. The
18 ultimate purpose of your deliberations is to reach a single
19 verdict which represents the conscientious viewpoint of
20 each and every member of the jury. Please do not be too
21 proud or too stubborn to change the viewpoint that you
22 initially express. Keep an open mind and see whether or not
23 you can not accept the points of view expressed by your
24 fellow jurors as your own, to see whether or not there is
25 any wisdom in what they say. I don't mean to suggest that

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1 you must change your mind merely because you are outnumbered.
2 The final verdict must represent the conscientious vote of
3 each and every participating member of the jury. But do keep
4 an open mind.

5 Your deliberations should not be like a debating
6 society where each one tries to show that he is superior in
7 debating ability, that he can convince everyone to come around
8 to his point of view. The object is not to try to win an
9 argument but to exchange viewpoints with open minds and to
10 try to reach a unanimity, a true single point of view which
11 each of you can embrace as your own.

12 I will see counsel in the robing room, if you will
13 excuse us for just a moment.

14 (In the robing room)

15 THE COURT: Exceptions or suggestions?

16 MR. BERMAN: Who do you want to hear from first?

17 THE COURT: I will hear from you.

18 MR. BERMAN: I noticed something strange, and that
19 is the section cited in the indictment for the first count
20 is titled 26 rather than Title 21 of the United States Code.

21 THE COURT: I am sure that is a typographical error.

22 MR. BERMAN: If it was a typographical error--
23 there are tax counts of drug offenses as well under Title 26.

24 THE COURT: You don't really assert that you have
25 been misled by that, that you would have done anything different
if the indictment had been typed without that error?

1 MR. BERMAN: I agree with you. I don't know if I
2 would have done anything differently. In terms of what the
3 potential penalties are now in this case it might turn out
4 to be different if this case were under Title 26.

5 I don't claim I would have tried the case
6 differently, your Honor. I just noticed it now for the first
7 time, so I thought I should bring it to everybody's attention.

8 THE COURT: All right.

9 MR. BERMAN: If it said Title 27 I would not have
10 any argument, but Title 26 I certainly have defended drug
11 cases--

12 MS. CUSHMAN: Is that all the way through the
13 indictment?

14 MR. BERMAN: In the conspiracy count only.

15 THE COURT: I think if you look at the sections,
16 it is clear that Title 21 is referred to. I don't think
17 that anybody could possibly be misled, particularly an
18 experienced attorney such as yourself, who recognizes the
19 sections without ever having to look them up.

20 MR. BERMAN: If you asked me to tell you what the
21 sections are, I probably would get the numbers wrong.
22 Usually they reserve the tax counts for cooperating witnesses.
23 When they want to give them a lesser penalty, they let them
24 plead to a tax count on drugs.

25 THE COURT: Have you got anything else?

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1 MR. BERMAN: If it said Title 27 I would say it
2 was a typographical error.

3 THE COURT: I believe you said that before.

4 MR. BERMAN: I object to your charge on reasonable
5 doubt, that reasonable doubt must be a substantial doubt.

6 THE COURT: Did I say substantial?

7 MR. BERMAN: You said substantial, not negligible.
8 I never knew that reasonable doubt had to be a substantial
9 doubt.

10 THE COURT: I will change that. Let me see what
11 I said first.

12 (Pause)

13 THE COURT: Well, that is what is in the government
14 case which came from the Kahane case.

15 MR. BERMAN: That is fine, but I still maintain
16 that the law is not that a reasonable doubt has to be a
17 substantial doubt. The word "substantial" is misleading
18 as far as I understand the law on reasonable doubt.

19 THE COURT: All right, I will explain that.

20 MS. CUSHMAN: I think, your Honor, if you want to
21 go into explanation of reasonable doubt and include all of
22 the balancing language which you included the first time,
23 which was very fair and balanced, I don't think the jury has
24 the idea it has to be a substantial doubt. To say it does not
25 have to be a substantial doubt without balancing it and saying

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1 that, however, it a doubt that is founded in reason and common
2 sense--

3 THE COURT: I will say that.

4 MR. BERMAN: I would like to be heard on that.

5 For years. I have been complaining, unsuccessfully, that the
6 charges the courts tend to read in this building are a little
7 bit government oriented, in that after defining reasonable
8 doubt for a paragraph or two, they sort of anti-define it
9 for two or three pages, about all the things reasonable doubt
10 is not. That is like setting up a strawman and knocking him
11 down.

12 THE COURT: Can't you make an objection without
13 giving us a law school lecture? Please be brief. Tell me
14 what your objections are instead of telling me what the
15 government always does or what other courts always do.

16 I am sorry if I sound impatient, but you do have
17 a way of being unnecessarily verbose. YOU must have had
18 this complaint before.

19 MR. BERMAN: I think I should be complimented on
20 how short my summation was instead of the two long and boring
21 summations made by the government. But that did not seem to
22 bother the Court. Although it did bother your whole
23 schedule. That is my reaction to that, your Honor.

24 But if you are going to correct a wrong concept
25 in your charge and then repeat the half of the reasonable

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1 doubt charge that is the pro government half, the the
2 least you can do is rep at the entire charge on reasonable
3 doubt.

4 The danger in reading the whole charge on reason-
5 able doubt is you may not be able to emphasize to the jury
6 enough what it is you are correcting. They may remember
7 what you said the first time and not the second time. If
8 you insist on doing more than correct the "substantial"
9 question, then I would ask that you read the whole thing
10 and not the negative half of what reasonable doubt is not.

11 THE COURT: What is your next objection?

12 MR. BERMAN: I have objections and requests
13 mixed in here. I renew all of my earlier requests. Whatever
14 I requested that you did not give, I renew.

15 THE COURT: I think in the course of the charge
16 there were some of your requests that I had marked in the
17 government's proposed charges to insert, and I ended up by
18 not reading the government's charge and I omitted--I think you
19 put in some of your requests and I will go back and do that.

20 MR. BERMAN: I will tell you which ones specifically

21 THE COURT: I know which ones they wer .

22 MR. BERMAN: I am renewing anything that I asked
23 be charged before that were not.

24 I would ask you to charge in terms of conspiracy,
25 the first element of conspiracy that it had to be one con-
 tinuous conspiracy continuing, at least to April 12th. I

1 thought yesterday you said you were going to charge that
2 way. YOU did charge that it did not have to be the whole
3 time alleged in the indictment. It would just be some portion
4 of that time, but I believe yesterday you were of the opinion
5 that they had to at least agree that whatever Mr. Attiles
6 joined was the same conspiracy that existed before and--

7 THE COURT: All right, I will refer to that.

8 MR. BERMAN: On the question of duration, you
9 said as long as he joined and you did not say as long as you
10 find beyond a reasonable doubt that he joined. I would ask
11 that beyond a reasonable doubt be included?

12 THE COURT: I said that so many times that I
13 think it is unnecessary to repeat it. I repeatedly said,
14 many more times than is in the government's requests, that
15 each element must be found beyond a reasonable doubt.

16 MR. BERMAN: Personally, I am not interested in
17 what is in the government's requests.

18 THE COURT: Let's not quibble about that, please.
19 I think I have covered it adequately.

20 MR. BERMAN: I can only make my request. Then you
21 said at some point, having joined the conspiracy he assumes
22 responsibility. Again, there, too, I would ask that it is
23 only if you find beyond a reasonable doubt that he joined,
24 then does he assume responsibility for all the other
25 acts and statements. You said it a second time, that if you
find a conspiracy existed and the defendant joined it, all

1 acts and statements are chargeable against him. There,
2 too, you left out reasonable doubt.

3 THE COURT: Well, I will repeat again that every
4 element must be found beyond a reasonable doubt.

5 MR. BERMAN: In connection with overt acts you
6 said that assuming you find a conspiracy existed and the
7 defendant joined it, and then you went on to say that you
8 also have to find at least one overt act. There, too, I
9 would suggest that it is assuming you find beyond a
10 reasonable doubt that a conspiracy existed and that the
11 defendant joined it.

12 I feel that beyond a reasonable doubt should have
13 been included there, too.

14 Moving on, I know the government early on in the
15 case told the Court they prepared a redacted indictment that
16 only had two counts. You read Count one and then you read
17 Count five and you said the words "Count five." Then you
18 explained to the jury the other counts were dropped. The
19 fact is the other counts were not dropped.

20 THE COURT: I said because they named the other
21 defendant.

22 MR. BERMAN: You did say that my defendant was
23 not named in Counts two, three, and four. The jury did not
24 have the misapprehension that he was named in some other
25 counts, but because you elected to tell the jury the
counts were dropped, they may have the impression the counts

1 against Mr. Perez were dropped. That gives them the wrong
2 impression.

3 MS. CUSHMAN: I have no objection to telling them
4 that.

5 THE COURT: All right.

6 MS. CUSHMAN: And the indictment was retyped and
7 the retyped indictment included the counts against Mr.
8 Attiles, called counts one and two in the redacted indictment.

9 MR. BERMAN: I just wanted to correct the statement
10 that the other counts were dropped. I am not asking you to
11 correct it by telling them that Perez has pleaded guilty,
12 but only to the limited extent of saying they were not
13 dropped.

14 [THE COURT] I think it is fair, as Ms. Cushman said, that Mr.
15 Attiles was not named in those counts.

16 MR. BERMAN: The next objection is you said Mr.
17 Attiles' failure to make statements. First of all, I
18 think it is too general, suggesting something about having
19 taken the stand or making a statement to the Prosecutor or
20 some statements to the agents during his booking. It does
21 not point to anything in particular.

22 I am not asking that the Court point to the fact
23 he should have said something while in Perez' apartment. I
24 don't think you should have taken that position. He was
25 present and did say some things actually. If I were a juror

1 I would think what the Court meant by that is that Mr.
2 Attiles should have said something disassociating himself
3 from whatever Perez was doing.

4 THE COURT: What I said was that they could
5 determine Attiles' knowledge and intent by his actions and
6 his statements and his failure to make statements if the
7 circumstances were such that a reasonable man would have
8 felt obliged to make a statement under the circumstances.

9 If you think that that might be misconstrued as
10 a reference to his failure to take the stand, I will be
11 glad to explain that.

12 MR. BERMAN: I am trying to formulate a fair way
13 of explaining it. Not his failure to take the stand
14 or his failure to make some sort of exculpatory statement to
15 the agents or the U. S. Attorneys after being arrested.
16 It could refer to anything.

17 THE COURT: No evidence about what statements he
18 did or did not make to the arresting officers.

19 MR. BERMAN: It was brought out twice he was taken
20 to the DEA headquarters for processing. I don't know why
21 in heaven's name that was brought out on direct, that he
22 was taken there for processing.

23 THE COURT: But there is no evidence as to what
24 he said or did not say on those occasions.

25 MS. CUSHMAN: Furthermore, your Honor, in the

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1 context of the language of that portion of your charge, it
2 does seem to me that it is perfectly apparant that what is
3 being talked about is what wook place at the time of the
4 alleged offense period, no more. I don't think that any
5 juror could be confused on the subject?

6 THE COURT: I doubt it very much, but if Mr. Berman
7 desires, I will explain that I wasn't talking about his
8 failure to take the stand.

9 MR. BERMAN: I don't think that is going to cure
10 anything. I prefer you not say that.

11 My problem is it is not a case where someone is
12 in actual possession of something and where you could really
13 say any normal person could explain what he is doing
14 holding the bag, holding the stolen checks or holding
15 the counterfeit money. He is introduced as a partner at
16 a point when the drugs are not yet around.

17 THE COURT: We have been over this before. I
18 know your point.

19 MR. BERMAN: My point is clear.

20 On this one I don't know if it is really worth
21 doing, but I did note you did not refer to the herion by
22 exhibit number and there is another set of heroin that is
23 another exhibit, or two other exhibits, I forget which.

24 On count two the jury would have to find that it
25 is the exhibit that was possessed, not exhibits three and four,

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1 whatever they were.

2 MS. CUSHMAN: Two and three.

3 MR. BERMAN: The one from the flower pot and one from
4 the container on top of the refrigerator. I mean I cannot
5 believe or I don't know what the jury is going to think,
6 but maybe the Court can formulate some sort of remark that
7 Count two refers exclusively to Exhibit one and not to those
8 other exhibits.

9 MS. CUSHMAN: I don't think there is really any
10 doubt that it is the five-ounce package.

11 MR. BERMAN: The danger is the jury could
12 convict on the stuff that is not in plain view.

13 THE COURT: It is clear that Count two refers to
14 five ounces. The only five ounces that was in the apartment
15 on April 12th was the five ounces that was put on the table
16 in front of Attiles.

17 MR. BERMAN: They don't know the weight of the other
18 packages.

19 THE COURT: The other packages were put in evidence
20 cigarette-sized packages.

21 MR. BERMAN: But they don't know the weight of
22 those packages.

23 THE COURT: All right.

24 MR. BERMAN: I have some general complaints about
25 the aiding and abetting charge, if I can read my handwriting
here. I think the Court defined it at one point as associating

1 or participating and it is enough if his assistance encourages.
2 My position is that that is not the law. He has to do
3 something to help bring it about, and that is different than
4 "encourages."

5 Also that it requires an intent to bring it about.
6 If his assistance encourages the thing to happen but that is
7 not his intent, that would not be aiding and abetting.

8 Here if he says that is fantastic stuff, but
9 it is not his intent to help along the sale, that would not
10 be aiding and abetting.

11 Objectively what would happen if he said it is
12 excellent stuff, that would help in the agents buying, but
13 that would not be aiding and abetting.

14 MS. CUSHMAN: It was in accordance with the law,
15 your charge, balanced and fair, and the jury is not going to
16 think that some kind of totally inconsequential presence at
17 the scene of the crime amounts to aiding and abetting.

18 THE COURT: The government's proposed charge, which
19 has apparently been approved by the Court of Appeals, says,
20 "It is sufficient if the assistance facilitates or encourages
21 a result that would have taken place without it."

22 MR. BERMAN: My position is that there still
23 has to be an intent to bring about the result to to help bring
24 about the result, and that if what someone does helps a crime
25 happen but there is no intent--

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1 THE COURT: All right, I will give them that.

2 MR. BERMAN: I think that the two
3 charges that I requested that you did not give but said you
4 would now give are the ones--

5 THE COURT: Numbers three and seven.

6 MR. BERMAN: The number of witnesses, not required
7 to accept uncontradicted testimony. I specifically renew
8 my request that the agents here are interested witness and
9 I would ask one more, and that is on the question of
10 credibility, how you judge credibility. I don't believe
11 the Court mentioned prior inconsistent statements.

12 THE COURT: I said the extent to which it was
13 corroborated or contradicted by the testimony or other evidence
14 available to you.

15 MR. BERMAN: But the report is not in evidence and
16 it is not in testimony, except it is in evidence in testimony
17 in the sense he acknowledge it. But the thrust of that would
18 make one think whether one agent corroborated or contradicted
19 the other.

20 I would ask for a specific charge on prior
21 inconsistent statements.

22 THE COURT: I think I have already covered that,
23 referring to a contradiction by other information available
24 to the listener.

25 MR. BERMAN: My only argument for that is, and

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1 perhaps it is the strongest thing my client has going for him,
2 the fact that the agent had an inconsistent statement about
3 the partner.

4 THE COURT: It is for that very reason that makes
5 me not want to do it. If I single out the strongest point
6 in the defendant's case for a supplemental charge, I don't
7 know whether that is fair to the government.

8 MR. BERMAN: I suppose you could squeeze it in
9 among all these other amendments.

10 MS. CUSHMAN: They are getting to be so numerous
11 and somewhat incoherent and disorganized, it would be
12 confusing to the jury and that is the thing the government
13 wants to prevent.

14 MR. BERMAN: I am sure the Court will only give
15 what is merited.

16 MS. CISHMAN: One thing I wanted to bring up, and
17 that is with respect to the government's request number eight,
18 that portion on page two which deals with the single
19 act, and you did not give that in the language requested.
20 And this is really in the interest more of protecting the
21 verdict.

22 THE COURT: "Must be such that you may reasonably
23 infer from it"?

24 MS. CUSHMAN: Yes. Recognizing that it favors the
25 defendant to include it, never the less I think it would be

1 appropriate.

2 MR. BERMAN: You are asking for that whole para-
3 graph, not just the first sentence?

4 THE COURT: All she wants is "A single act must
5 be one from which you may infer knowledge and intent."

6 MR. BERMAN: If she is just asking for the first
7 sentence, I would ask that the whole paragraph be read, because
8 that is the other side of the coin and then it would be in
9 context.

10 MS. CUSHMAN: "A single act must be such that you
11 can reasonably infer from it such an intent."

12 I have no strong objection to the whole paragraph
13 being read.

14 MR. BERMAN: Then we both agree you should read
15 that one paragraph, that middle paragraph of the page there.

16 THE COURT: All right.

17 MS. CUSHMAN: The only thing that I just hope is in
18 giving all of these miscellaneous requests, that there is
19 some sense--that the coherence of the Court's original charge,
20 which was excellent from the government's point of view,
21 not be lost.

22 THE COURT: I will try to do that.

23 MR. BERMAN: I am sure the Court will handle it
24 fine.

25 I have nothing else.

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1 THE COURT: All right.

2 (In open court, jury present.)

3 THE COURT: You might think that with a charge
4 as long as the one I made there could not have been anything
5 more which could possibly have been said, but that is not
6 quite right. I am going to explain a few of the remarks
7 I made a little further and perhaps modify one or two of
8 them.

9 At one point in defining reasonable doubt, I said
10 that a reasonable doubt is one which is a substantial and
11 not merely negligible. I should not have used the word
12 "substantial." The test is reasonable doubt, and I have
13 defined that at great length. I will not repeat all of that
14 portion of the charge, but I will summarize it very briefly.

15 A reasonable doubt is a doubt based on reason,
16 the kind of doubt that would cause you to hesitate to act
17 in matters of importance in your own personal and business
18 lives. It is not proof beyond all possible doubt, but proof
19 beyond a reasonable doubt.

20 Now, in various parts of the charge I did not repeat
21 that expression, beyond a reasonable doubt, every time. I
22 want to re-emphasize that every one of the three elements
23 which the government must establish to make out the offense
24 charged in Count one and everyone of the three elements
25 which the government must establish to make out the offense
charge in Count two must be established beyond a reasonable

1 doubt. If the government fails to establish any of the
2 three elements in Count one beyond a reasonable doubt, you
3 must return a verdict of not guilty on Count one.

4 Likewise, if the government fails to establish
5 beyond a reasonable doubt each of the three elements which I
6 listed in connection with Count two, then you must return a
7 verdict of not guilty on that count.

8 With respect to Count one, the conspiracy count,
9 I at one point told you that it is not necessary for the gov-
10 ernment to establish that the defendant, Jose Attiles,
11 became a member of the conspiracy prior to April 12, 1977,
12 as long as he joined the conspiracy with knowledge that it
13 was an ongoing conspiracy and with knowledge of its illegal
14 purposes and with the intent to advance those illegal purposes,
15 then you will have found or then you will find that he is
16 a member of a conspiracy to the extent that he becomes
17 responsible for the actions that took place prior to April
18 12, 1977.

19 But you must find, in order to hold him chargeable
20 for the things that took place prior to April 12th, that it
21 was one and the same conspiracy. Not necessarily with the
22 same members at all times, not necessarily looking forward to
23 a single transaction at all times, but a single conspiracy
24 with an unlawful purpose of dealing in heroin, and that he
25 joined the conspiracy not only with knowledge of that purpose
but also with knowledge of the ongoing nature of the single

1 conspiracy. And you must find that beyond a reasonable doubt.

2 Now, with respect to Count two, in defining aiding
3 and abetting I used the expression of "encouraging a result."
4 I said that if you find that he performed a single act which
5 encouraged, in other words promoted a certain result, then
6 you could find him guilty on Count two as aiding and
7 abetting in that result. Again you must find this beyond
8 a reasonable doubt.

9 But you must also find that that result did not
10 just happen as a result of his participation, but at the time
11 he--I should not say that. Again I am misstating.

12 What you must find is that someone else, specifically
13 Manuel Perez, possessed with intent to distribute a narcotic
14 drug, and that the defendant, Jose Attiles, performed at
15 least one act for the purpose of assisting Manuel Perez in
16 the Possession or intended distribution of that drug, with
17 the intent of so assisting Manuel Perez.

18 In other words, if he inadvertently or accidentally
19 or without intending to do so assisted Manuel Perez, that
20 would not suffice. You must find beyond a reasonable doubt
21 that he intended to assist and performed at least one
22 act to carry out that intention to assist in the possession
23 and/or distribution of narcotic drugs.

24 And when I say "possession" I mean possession
25 with the intent to distribute, Again, You must find this

1 beyond a reasonable doubt.

2 Likewise, in connection with Count one I said
3 that a single act of the defendant, such as assisting in the
4 sale of heroin by another member of the conspiracy, may be
5 sufficient to draw that defendant into the scope of the
6 conspiracy.

7 I should add, however, that since conviction for
8 conspiracy requires an intent to participate in the unlawful
9 enterprise, the single act itself must be such that you may
10 reasonably infer from it such an intent, or there must be
11 independent evidence tending to prove that the defendant had
12 some knowledge of the broader conspiracy beyond his single
13 act.

14 Now, referring back to Count two, it is clear
15 it refers to possession of five ounces of heroin hydrochloride
16 on or about April 12, 1977. The five ounces that the
17 government charges was possessed with the intent to distri-
18 bute it is the five ounces which was, according to the testi-
19 mony of the government witnesses, taken by Manual Perez from
20 the kitchen area or at least brought back by him when he
21 returned from the kitchen area and placed on the table in
22 front of where Jose Attiles was seated. Not the other material
23 which was found in a search of the bedroom area later on.

24 When I referred to the weight of the evidence and
25

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1 the credibility of the witnesses I don't refer to the number
2 of witnesses that the government called or to the number of
3 documents and other exhibits received into evidence, or to
4 the length of time each witness testified. I was referring
5 to the quality of the evidence, not its quantity or its
6 duration; Even though testimony is not impeached, you are
7 not required to accept it. You may decide that because of
8 the witness' behavior on the stand or because of the inherent
9 improbability of his testimony or because of your conclusion
10 as to his motivation to testify falsely or for any other
11 reason that you do not believe his testimony and that such
12 testimony should therefor not form the basis of a verdict of
13 guilty. It is entirely up to you to determine the
14 credibility of a witness, whether or not that witness was
15 impeached or broken down on the stand.

16 Anything further?

17 MR. BERMAN: I don't know if you were going to
18 say something about those other counts or not.

19 THE COURT: Oh, thank you.

20 I did say at one point that there were originally
21 five counts in the indictment or there are five counts in
22 the indictment. This defendant, Jose Attiles, is named in
23 only two of those five counts. Originally Counts one and five
24 in the modified copy of the indictment which will be avail-
25 able for your inspection, those two counts are numbered

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1 one and two.

2 I told you that you should not speculate as to
3 why Mr. Perez is not being tried in this case. The other
4 counts in the indictment were not dropped. Do not speculate
5 beyond that as to what is going to happen with respect to
6 those other counts They are not involved in this case at all.

7 You are concerned only with Counts one and two
8 of the indictment as it has been modified or abridged.

9 Anything else?

10 MR. BERMAN: That's all.

11 THE COURT: We can excuse Mr. Dunbar, our remaining
12 alternate juror, and I thank you very much for bearing with
13 us.

14 You may swear in the marshall, please.

15 (Marshall sworn.)

16 THE COURT: You may now retire to begin your
17 deliberations.

18 (Jury commences deliberations at 3:45 P.,.)

19 MR. BERMAN: Your Honor, I think this can be off
20 the record.

21 (Discussion off the record.)

22 THE COURT: I was going to suggest that counsel
23 stipulate, if the jurors call for any of the exhibits,
24 excepting the heroin of course, that the Deputy Clerk will
25 simply make a note of that and send the exhibits in without

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COURT'S FIRST ALLEN CHARGE

(Trial Transcript, pp. 546 - 547)

1 RDSpa 68

2 THE COURT: I will refer to it.

3 Your objection is noted.

4 Bring in the jury.

5 (Jury present.)

6 THE COURT: I have your note indicating that
7 you have voted several times and have not been able to
8 reach a unanimous verdict and that in your opinion it
9 appears that further discussions would be futile.

10 I am going to have to ask you to come back
11 tomorrow morning and try again. The reason, of
12 course, is that a trial involves considerable expense
13 for the government. The government attorney and the
14 witnesses are tied up and prevented from doing other work.
15 It involves an ordeal for the defendant in terms of
16 suspense and mental anguish, and it's to the advantage
17 of both sides that a definitive verdict be reached.

18 In the event you are unable to reach
19 a verdict, in all probability the case will simply have
20 to be retried before another jury. There is no reason
21 to expect that the evidence at the retrial would be any
22 different than the evidence that was presented to you.
23 So that a subsequent jury is going to have exactly the
24 same problem that you have.

25 I therefore am going to ask you to try again.

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1 And I repeat what I said earlier, that each of you should
2 approach your jury deliberations not in the spirit of
3 trying to win a debate but in the spirit of listening
4 with an open mind to what your fellow jurors are saying,
5 to see whether you can't, in that spirit, conscientiously
6 adopt as your own the viewpoints being expressed by others.
7 Don't be too proud or too stubborn to change your mind.
8 Listen carefully to what they say. Reflect on it
9 to see whether or not you can't, after such reflexion,
10 embrace as your own the other viewpoints expressed.
11

12 Now, I want to emphasize that you should not
13 give up a viewpoint that you still conscientiously
14 hold merely because you are outnumbered. The ultimate
15 verdict must represent the conscious vote of each and
16 every participating juror.

17 Think about these things tonight and come
18 back in the morning and make a fresh start to see if you
19 can't reach a verdict one way or the other that
20 will represent the viewpoint of all of you.

21 You are excused and you will come back at
22 9:30 in the morning.

23 Have a good evening.

24 MR. CUSHMAN: Does your Honor wish to repeat
25 the routine discussions to the jury?

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COURT'S SECOND ALLEN CHARGE

(Trial Transcript, pp. 552 - 554)

1
2 THE COURT: I am going to ask them to go
3 back and try again.

4 MR. FERMAN: Are you going to give anything
5 in the nature of an Allen charge or what you just said
6 now?

7 THE COURT: Well, I may summarize the Allen
8 charge.

9 MR. FERMAN: If so, I renew my opposition to
10 it. That's why I wanted to know in advance what is
11 going to happen.

12 THE COURT: You have a continuing objection
13 to this and any further Allen charges.

14 (Jury present.)

15 THE COURT: I have your note in which you
16 indicate that you have gone over the evidence again and
17 have still been unable to reach a verdict. I think you
18 should continue trying because as a result of the subway
19 breakdown this morning you weren't able to start your
20 deliberations until some time after 11:00. Then you
21 apparently went out to lunch around about 12:45. So
22 that you really have had only about an hour and 45 minutes
23 today. And I think considering the importance of reaching
24 a verdict, if one can be reached, that you ought to try
25 further.

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1 BPS: 75

2 As I told you last night, it's to no one's
3 interest to have a hung jury or a deadlocked jury, as
4 you referred to it.

5 As I told you, the government must go to
6 considerable expense and considerable involvement of
7 its attorneys and the drug enforcement agents in order to
8 put on a trial. And in the event of a hung jury, in all
9 probability, all of that will have to be repeated again.

10 The defendant also, as I told you, is
11 kept in suspense, not just for the duration of another
12 trial but until that other trial can take place. And
13 there is considerable mental anguish for him as well in
14 waiting for another trial and then going through that
15 trial experience again.

16 So please try to see if you can't reach
17 a verdict. Approach it, really, in a spirit of
18 cooperation and of willingness to accept the points
19 of view being expressed by others. Don't be so much
20 interested in selling your own point of view to others as
21 in seeing whether or not you can't be sold on other
22 points of view being expressed.

23 Don't feel you have to win the argument in
24 order to show your superiority as a debater. Don't
25 be too proud or too stubborn to change the points of view

1 that you have expressed, however forcefully you might
2 have expressed it.
3

4 I do want to emphasize, however, that
5 you should not return a verdict which does not represent
6 the ultimate conscious viewpoint of each and every
7 member of the jury. Don't feel that you must give up
8 a point of view that you still consciously hold merely
9 because you are outnumbered.

10 But see if you can't adopt the other ideas
11 ultimately as your own.

12 Try a while longer and approach it in that
13 spirit of cooperation and of willingness to accept the
14 ideas of others and adopt them as your own.

15 Thanks very much.

16 (The jury continues deliberations at
17 3:00 P.M.)

18 MR. BETMAN: In hopefully one sentence,
19 I take exception to the giving of an Allen charge again.
20 I specifically take exception to the Court's telling them
21 that it cost the government a lot and there was
22 expense or inconvenience to government witnesses,
23 especially in this case which only had government witnesses
24 and no defense witnesses.

25 THE COURT: I don't know why there is any

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL TERSMAN , being duly sworn, deposes
and says: deponent is not a party to the action, is over
18 years of age and resides at 452 Riverside Dr., N.Y.C.

On February 6, 1978, served the within

upon Appellants Appendix
Robert B. Fiske, Jr. attorney(s)
for Appellee in this action, at

1 St. Andrew's Plaza, N.Y.C. 10007,
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in - post-office- official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Michael Tersman

Sworn to before me on
February 6, 1978.

John B. [Signature]

Notary Public for the State of New York
No. 31520718
Qualified in New York County
Commission Expires March 30, 1979

